



Memorandum

TO: TRANSPORTATION AND
ENVIRONMENT COMMITTEE

FROM: Richard Doyle
City Attorney

SUBJECT: Commercial Solid Waste
Franchise Wage Policies

DATE: January 22, 2009

BACKGROUND AND INTRODUCTION

On September 16, 2008, the City Council directed the City Attorney's Office to evaluate the feasibility of requiring prevailing wage and worker retention in the Request for Proposals ("RFP") for exclusive commercial solid waste service franchisees.

This Office recommends against including a prevailing wage requirement in the RFP because prevailing wage requirements are usually imposed when the City is acting in a market participant capacity. Since the City would not be acting as a market participant but rather will act in its regulatory capacity with regard to the franchisees, imposing a prevailing wage requirement could be challenged on the basis of preemption under the National Labor Relations Act ("NLRA"). On the other hand, the City has imposed living wage requirement when it acted in a regulatory capacity; consequently, requiring franchisees to pay workers a living wage would not be subject to the same legal challenge. Accordingly, a living wage requirement could be included in the RFP.

The City's authority to include worker retention requirements in the RFP is unclear. Worker retention requirements have been upheld in two other jurisdictions; however, the federal courts within the Ninth Circuit have not decided this issue.

DISCUSSION

I. Prevailing Wage

"Prevailing wages" are the hourly wage rates that are established for the various workers within each of the various trades, occupations and classifications of work on a project. They are reflective of local wage conditions in that they are the wage rates that "prevail" within a given geographic area for particular classifications of work. Often times, the prevailing wage is the wage established by a collective bargaining agreement. Under case law, the City's authority to impose prevailing wages depends on whether it is acting as a "market participant" or in its regulatory capacity.

A. Market participant versus regulator

Preemption by the NLRA is limited to state or local government labor regulation and not all legitimate state or local activity that affects labor. This distinction was applied by the U.S. Supreme Court when it found the City of Los Angeles could not require the resolution of a labor strike as a condition for renewing a taxicab franchise license. In that case, Los Angeles attempted to exercise its exclusive authority to issue the license to shift the balance power in the bargaining process. In another case, the state, as owners of the sewage treatment facilities to be built, could require bidders for the project to abide by labor agreement terms. The difference is the state or local government may pursue a purely proprietary interest since private parties in similar situations would be free to negotiate these terms and conditions.

Here, the City's prevailing wage policy applies only when the City is directly contracting with a third party for work or services i.e., when the City is acting as a "market participant." For example, prevailing wages apply when the City enters into a contract for the construction of a public works project. It also applies to certain services agreements entered into by the City. Since the City started providing residential solid waste services ("Recycle Plus") in 1993, the City has required prevailing wage for truck drivers. In the 2006 Recycle Plus RFP, Council also required material recovery facility sorters be paid prevailing wage.

Unlike the above situations, the City would be acting as regulator - and not as a market participant - by requiring that the successful proposer for the commercial solid waste servicer pay prevailing wage as a condition of a franchise. By contrast to Recycle Plus services, the City has not assumed the responsibility for providing solid waste services to commercial generators. Instead, the City grants franchises subject to regulations such as hours of service and franchise fees for the right to use City streets and to provide this service to San Jose businesses.

B. Federal labor law preemption

When acting as a market participant, the City has greater freedom from the limits of federal and state laws that would otherwise prohibit or preempt local regulation. The National Labor Relations Act ("NLRA") is a federal labor law that protects employers' and workers' right to collectively bargain to negotiate the terms and conditions of employment. State and local laws are preempted by the NLRA if they regulate areas covered by the NLRA or frustrate an area Congress intended to leave free to economic forces.

The Ninth Circuit has held that the NLRA preempts public entities from imposing prevailing wage requirements as part of a regulation because it interferes with an area Congress intended to leave to the free play of economic forces. The general rationale of these cases is that the prevailing wage rate for a particular class of employees is an averaged rate based on the rate negotiated by third parties in that locality. The pay rate for a specific class of employees is frequently established as part of negotiations that also include other issues, such as working conditions, job duties, and/or benefits, issues

that are unique to a particular work-place or specific job, and the imposition of prevailing wage could interfere with labor negotiations regarding these issues.

While two subsequent Ninth Circuit cases have found in favor of requiring prevailing wage for apprentices in public construction projects and apprentices hired from state approved programs for private construction projects, these cases were distinguished based on the facts.

Accordingly, when acting as a market participant, the City may include prevailing wage requirements in its agreements. However, if the City is acting in its regulatory capacity, preemption issues arise with regard to trying to impose a prevailing wage

II. Imposition of living wage

In the Environmental Services Department memo to Council, staff recommends requiring the exclusive franchisees pay their employees living wage. The City has the authority to impose such a requirement.

The "living wage," in contrast to the "prevailing wage," is a single wage rate – fixed at a level above the federal and state minimum wage requirements - applicable to certain designated workers within a geographic area. It is the minimum rate for meeting basic living expenses in the San Jose area. Moreover, the living wage is the same for all workers irrespective of their position or job duties.

Importantly, the NLRA does not preempt state and local governments from enacting minimum substantive labor regulation of general applicability which serve a broader public interest. For example, federal cases have held that the NLRA does not preempt minimum wage laws because they merely form the backdrop for labor negotiations. The Ninth Circuit has concluded that because "living wages" are so similar to minimum wage requirements, they too are not preempted by the NLRA. Accordingly, the City could include a living wage requirement in its franchises.

To impose such a requirement, the City would need to adopt an ordinance in its regulatory capacity to require that commercial franchisees pay living wage. The City also would need to amend its current living wage policy to eliminate the current exemption for franchises. The City could limit the application of living wage to exclusive commercial solid waste franchises (as opposed to more general application to all franchises or other sectors in the City), provided the City has a rational basis for doing so.

The City would likely be able to establish a rational basis. Unlike the City's practice with respect to other franchises, the City may limit the number of franchises that can provide solid waste services to only two or three companies. Moreover, the City recently adopted Green Vision and Zero Waste goals and in order to meet these goals, the City will need to redesign its solid waste systems and impose more regulations on the commercial solid waste franchisees. It is in the City's public interest to ensure that this basic mandatory public health service to businesses is not interrupted and qualified

employees provide the vital service. Finally, there is precedent in the residential solid waste service sector for requiring workers with commensurate job responsibilities, such as truck drivers, and material recovery facility workers at a dedicated facility, be paid at least a living wage.

III. Worker Retention

Council has also proposed requiring the successful franchisees to retain employees of the former hauling companies. While the majority of the approximately twenty (20) companies would continue to provide hauling services to construction and demolition debris generators, a few companies could lose the right to provide regular garbage service. The employee retention requirement in the City's living wage policy does not currently apply to franchises. In two federal reported cases from a District Court in New York and the D.C. Circuit Court, worker retention requirements imposed by cities were found not to be preempted by the NLRA because it did not interfere with the bargaining process. New York and the District of Columbia imposed worker retention requirements that were substantially similar to the City's policy. Additionally, the City's policy would allow the employer to hire the retained employees on the same terms for all its employees. However, the City would be under the jurisdiction of the Ninth Circuit and since the federal courts within the Ninth Circuit have not decided on the issue, it is unclear if such a requirement would be challenged.

CONCLUSION

The City has limited its application of prevailing wage requirements to those circumstances in which it is acting as a market participant. In the case of the commercial solid waste services it is not acting in that capacity. Consequently, it could be vulnerable to legal challenge if it acts as a regulator to impose a prevailing wage requirement in the RFP for exclusive commercial solid waste service franchisees. However, the City can require a living wage requirement as a regulator on franchisees in the City. Finally, worker retention requirements imposed by regulators have been upheld in other jurisdictions, which provides support for the City's approach to mandating worker retention to commercial solid waste servicers but may be subject to a legal challenge within our circuit.

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